

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

)	
In the Matter of)	
)	
Petition of USTelecom for Declaratory Ruling)	WC Docket No. 13-3
that Incumbent Local Exchange Carriers)	
Are Non-Dominant in the Provision of)	
Switched Access Services)	
)	

**COMMENTS OF
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

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Table of Contents

DISCUSSION.....	1
I. USTA Fails to Support its Claim That ILECs Are Not Dominant For Switched Access Service.....	3
A. USTA fails to justify its use of a nation-wide geographic market.....	4
B. USTA’s reliance on the FCC’s <i>Program Access Order</i> is misplaced	6
C. USTA provides no evidence regarding competitive conditions in the business market	7
II. USTA’s claims re broadband deployment incentives are confused and unsupported	9
CONCLUSION	11

**Before the
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In the Matter of)	
)	
)	
AT&T and NTCA Petitions Re)	GN Docket No. 12-353
Deployment of IP Technologies in)	
Public Networks)	
)	

**COMMENTS OF
THE AD HOC TELECOMMUNICATIONS USERS COMMITTEE**

The Ad Hoc Telecommunications Users Committee (“the Committee” or “Ad Hoc”) hereby responds to the Commission’s Public Notice¹ seeking comment on the petition captioned above. In its petition, the United States Telecom Association (“USTA”) seeks a declaration that incumbent local exchange carriers (“ILECs”) nationwide are non-dominant in the provision of interstate switched access services.

The Commission should deny the petition as to all of the relief it seeks because USTA has failed to support the petition with evidence that would justify granting it. Indeed, as to all of the services USTA’s members provide to enterprise customers, USTA has failed to proffer any evidence at all.

DISCUSSION

USTA argues that the declaration it seeks is justified because ILEC customers can obtain voice services from wireless providers and cable companies that have

¹ *Wireline Competition Bureau Seeks Comment on United States Telecom Association Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, WC Docket No. 13-3, Public Notice, DA 13-21 (released Jan. 9, 2013).

deployed voice over Internet protocol (“VoIP”). But this argument assumes erroneously that interstate access service consists only of voice service. In fact, however, access lines can be, and historically have been, routinely used for content other than voice. FCC jurisdiction over, and regulation of, ILEC access lines has never depended upon whether end user customers were placing voice calls over those lines. The same ILEC network has been used and the same FCC rules have applied whether an end user was placing a voice call or sending a fax or using dial-up Internet services.

Thanks to advances in network technology and the evolution of the public network from a circuit-switched to a packet-switched environment, access lines today connect to a much more sophisticated public packet-switched network that is capable of transmitting traffic associated with a broad range of content, including applications used (and selected) by customers. But an end user’s choice of content does not determine whether an ILEC is dominant. ILEC dominance depends upon the nature of the competitive forces at work in the geographic markets for ILEC transmission service.

As ILECs update their networks with packet technologies, so should the Commission update its rules; the per minute usage charges developed for an analog world may not serve the Commission’s goals and policies or promote efficient resource allocation in a packetized network. But as USTA itself acknowledges, the Commission is already re-examining many of its legacy rules in a number of dockets.² If USTA’s

² USTA Petition at pp. ii and iii. See, e.g., *FCC Chairman Julius Genachowski Announces Formation of “Technology Transitions Task Force,”* FCC Press Release, (rel. Dec. 10, 2012); *Comment Sought on Transition from Circuit-Switched Network to All-IP Network*, NBPbPublic Notice #25, GN Docket Nos. 09-47, 09-51, 09-137, Public Notice, 24 FCC Rcd. 14272 (2009); *2010 Biennial Review of Telecommunications Regulations*, CG Docket No. 10-266, Public Notice, DA 11-2050 (rel. Dec. 23, 2011). See generally *USF/ICC Transformation proceeding Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*; WC Docket Nos. 10-90, 07-135, 05-337, 03-

objective is to contribute to the Commission's analysis of its rules to identify and update those that are obsolete, then USTA can be a thoughtful participant in the proceedings conducting that analysis. If USTA believes the scope of those proceedings is too narrow, it can file comments or a petition seeking additional relief not already at issue in those proceedings. Indeed, USTA itself has filed a petition for forbearance under Section 10 of the Act³ that covers the same services (and more) that are the very subject of this petition.⁴ But USTA did none of those things. Instead, USTA filed the instant petition for declaratory ruling which raises no new issues, proffers no new evidence regarding issues already under review in existing proceedings, diverts resources away from those proceedings, and imposes unnecessary burdens on other parties who must respond to USTA's frivolous pleading.

I. USTA Fails to Support its Claim That ILECs Are Not Dominant For Switched Access Service

USTA claims in its petition that ILECs are non-dominant in the provision of the services for which it seeks relief but then fails to support that claim with probative data or analysis. The limited analysis it does provide includes no specific data regarding the nature and competitive conditions associated with the services, carriers, and locations for which it would have the Commission find ILECs non-dominant. USTA provides no identification of product or geographic markets, no analysis of entry barriers or potential competition, nor any of the other factors previously identified by this

109, CC Docket Nos. 01-92, 96- 45, GN Docket No. 09-51, Report and Order and Further Notice of Proposed Rulemaking, FCCNo.11-161 (rel. Nov. 18, 2011) and follow-on notices.

³ 47 U.S.C. § 160.

⁴ See *Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) From Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61 (filed Feb. 16, 2012)

Commission as necessary parts of any assessment of market power,⁵ which is what the Commission performs to evaluate a claim of non-dominance.⁶ Instead, USTA's petition presumes that the serving area of every ILEC in the country falls into a single geographic market with identical market conditions. The world as USTA sees it is one in which all voice communications are identical and all switched access lines – residential and business, rural and urban – are subject to the same competitive pressures.

A. USTA fails to justify its use of a nation-wide geographic market

USTA makes no effort to define relevant geographic markets for switched access services in its filing. It provides historic evidence of nationwide residential demand trends for “households” (projected forward for all data points after 2010)⁷ and suggests that the Commission look at the larger nationwide trend and infer that ILECs nationwide should be declared non-dominant. But treating the market for local service as a single nationwide market ignores substantial economic differences between locations that can affect competition. USTA presents no evidence or arguments for doing so.

USTA's overbroad geographic market would, for example, require the Commission to conclude that the 320 or so inhabitants of Adak, Alaska – where the only providers of traditional wireline voice, wireline broadband, and wireless phone service

⁵ *Petition of Qwest Corporation for Forbearance Pursuant to 47 USC §160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622 (2010), *pet. for review pending*, *Qwest Corp. v. FCC*, No. 10-9543 (10th Cir. filed July 30, 2010) (“*Qwest Phoenix II Forbearance Order*”).

⁶ *See, e.g., Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

⁷ *See, e.g., USTA Petition* at 45.

are owned by the same parent company⁸ – face the same competitive conditions as customers in New York, Boston, or San Francisco. The numerous filings by small LECs claiming that continued subsidization of their services at historic levels is vital to subscribers in their service areas being able to obtain service are testament to the fact that competitive options do not exist uniformly across the country.⁹

Moreover, the data (particularly the forecasts) USTA does provide appear questionable on their face. According to USTA's data, ILECs provided service to 54.4-million US households at the end of 2010,¹⁰ and that line count can be projected to have dropped to 46.8-million by year end 2011. But FCC-reported data in the most recently released "Local Competition Report" demonstrates actual ILEC residential switched access line sales of 58.2- and 52.5-million for the years 2010 and 2011, respectively.¹¹ Similarly, USTA's estimate of lost lines (households) from 2010 to 2011 is one third greater than the actual data reported by the FCC. Given USTA's pattern of inaccuracies, the Commission cannot reasonably rely on USTA's forecasts for 2012 and 2013.

⁸ See Comments of the Ad Hoc Telecommunications Users Committee in Dockets 10-90 et.al. filed Apr. 18, 2011, at p. 9.

⁹ See, e.g., *Wireline Competition Bureau Seeks Comment on the South Central Telephone Association, Inc. Petition for Waiver of Certain High Cost Universal Service Rules*, WC Docket Nos. 10-90 and 05-337, Public Notice, DA 12-2086 (released Dec. 26, 2012); *Petition of Windy City Cellular, LLC, for Waiver*, WC Docket No. 10-90 et al. (filed Apr. 3, 2012); *Petition of Adak Eagle Enterprises, LLC for Waiver of Section 54.302 of the Commission's Rules*, WC Docket No. 10-90 and WT Docket No. 10-208 (filed May 22, 2012). See also *Connect America Fund*, WC Docket No. 10-90, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, *Petition for Waiver of Windy City Cellular, LLC*, Order, 27 FCC Rcd 6224 (2012).

¹⁰ USTA Petition at 45.

¹¹ FCC *Local Competition Report*, released January 2013, Table 2.

B. USTA's reliance on the FCC's *Program Access Order* is misplaced

Instead of providing evidence to support its claim of nationwide non-dominance for ILECs, USTA argues that the Commission should abandon its “market power” test for non-dominance and substitute the test the Commission used in the *Program Access Order*.¹² USTA claims that the Commission used an “analytical framework” in that order for a “virtually identical situation where it found that cable companies are no longer dominant nationwide in the MVPD market.”¹³ USTA claims that the Commission reclassified cable providers in that *Order* as no longer dominant on a nationwide basis, despite the fact that some cable-providers had market shares as high as 80% in some markets.¹⁴

USTA's description of the *Program Access Order* is simply wrong.

The *Program Access Order* analyzed whether a blanket prohibition on certain exclusivity contracts between cable providers and cable-affiliated program vendors (for satellite-delivered programming) should be extended or whether such contracts should instead be subject to the same procedures for review as terrestrially-delivered programming.¹⁵ The Commission found that its existing rules for reviewing exclusivity contracts for terrestrially-delivered programming provided adequate protections for competitors, citing numerous instances in which its review of exclusivity contracts and their competitive effects had resulted in those contracts being disallowed.¹⁶ Accordingly,

¹² *Revision of the Commission's Program Access Rules*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 12-68, 27 FCC Rcd. 12605 (2012) (“*Program Access Order*”)

¹³ USTA Petition at 4.

¹⁴ USTA Petition at 11 and 4.

¹⁵ *Program Access Order* at paragraphs at 1 and 2.

¹⁶ *Program Access Order* at paragraphs at para. 3 and footnote 10.

the Commission chose to apply to satellite-delivered programming the same case-by-case review process used for terrestrially-delivered programming.

Contrary to USTA's characterization, the *Program Access Order* did *not* make a nation-wide finding of non-dominance despite 80% market shares for cable companies in some markets. In fact, the Commission found quite the opposite, when it emphasized “clear evidence in the record that cable operators remain dominant in some regional markets.”¹⁷ But the Commission also found that, despite cable company dominance in some markets, the alternate rules for a case-by-case review process were sufficient to ensure that cable providers did not abuse that dominance. In other words, non-dominance was not a pre-requisite for the change the Commission made in its rules, unlike the changes USTA seeks in its petition. Indeed, as the Commission points out in the *Program Access Order*, the courts have found that dominance in “some” cable markets is a necessary pre-requisite for case-by-case review.¹⁸

C. USTA provides no evidence regarding competitive conditions in the business market

USTA's petition seeks a finding of nondominance for both enterprise customer services and residential services. But the competitive evidence USTA supplies, such as it is, does not address competition in the enterprise customer market. In fact, the only time USTA uses the term “enterprise” in its petition is in its description of the “relief” it is requesting, when it asks that the Commission find ILECs “no longer presumptively dominant when providing interstate mass market and enterprise switched access

¹⁷ *Program Access Order* at paragraph 67.

¹⁸ *Id.*

services.”¹⁹ USTA simply provides no data regarding competition or competitive alternatives to the business services of its members. The data and discussion USTA does provide – regarding residential customers and their “switched access” and “telephone” lines – is simply irrelevant for purposes of determining whether USTA members possess market power in the enterprise services market.

The available information regarding marketplace conditions for business switched access lines paints a very different picture from the nationwide residential evidence that USTA uses to support its filing. USTA’s contentions regarding residential markets are supported by data on the number of households it contends are “wireless-only” households that obtain services from non-ILECs or using ILEC VoIP services, and households using traditional wireline services. There is no evidence in USTA’s filing, or anywhere else, that “wireless-only” business entities comprise a measurable share of the business market. Wireless services are broadly used by enterprise customers for mobility purposes, but do not act as a substitute for wireline services. Nor has the migration from traditional switched access services to VoIP-based services occurred in the same manner as that in the enterprise market. Again, the FCC’s most recent Local Competition Report notes that, at year-end 2011, 37.2% of wireline voice connections to residential customers were provided via VoIP compared to only 9.5% of business switched access lines.²⁰

As the Commission observed when it rejected Qwest’s attempt to take USTA’s approach and apply an analysis of residential market conditions to the business market,

¹⁹ USTA Petition at 9. Elsewhere in its petition, USTA requests identical treatment for “business” switched access service and “residence” or “mass market” switched access. *Id.* at 48.

²⁰ *Local Competition Report*, n. 11, *supra*, at Chart 3.

[t]he focus...on Qwest's market share for retail mass market telephone service was not, by itself, sufficient to determine whether Qwest possessed the power to control price (in other words, individual market power) in the markets for retail mass market services or retail enterprise services, or in any wholesale market. Nor did the generalized claims about competition for enterprise customers allow for such an evaluation.... Accordingly, the [prior] Commission's nearly exclusive emphasis on Qwest's share of the mass market retail voice marketplace--without meaningful consideration of Qwest's market shares in other relevant retail and wholesale markets, as well as other factors pertinent to whether Qwest, individually or jointly, possessed market power in those markets--is not supported by current economic theory.²¹

In this case, because USTA simply fails to provide any evidence regarding the market for business service, its petition can be summarily denied.

II. USTA's claims re broadband deployment incentives are confused and unsupported

USTA summarily asserts that dominant carrier rules are creating disincentives for ILECs to deploy broadband service. The Petition repeats this claim in two sections: Section II.D., which ostensibly discusses how “outdated legacy rules” impede deployment of “new technologies and services,” and Section II.F., which purports to explain how dominant treatment of ILECs discourages the deployment of “new broadband networks.” Yet neither section in fact discusses these issues in any detail nor do they provide any analytical or evidentiary support for USTA's claims.

The deficiencies of Section II.F. are the clearest. This five and a half page section merely re-hashes the claims USTA makes in the preceding pages regarding competition from wireless providers and cable VoIP. The only discussion of broadband deployment incentives is a single sentence at the very end of the section which merely quotes without commentary a statement in the Commission's *National Broadband Plan*

²¹ Qwest Phoenix II Forbearance Order, n. 5 *supra*, at 8635, ¶ 28.

that "un-necessary [sic] regulation is 'siphoning investments away from new networks and services.'"²²

Section II.D. is similarly devoid of relevant analysis or supporting evidence. It includes the quote from Section II.F, makes a handful of unsupported claims that regulation impedes investment in packet-mode services, describes the benefits that packet-mode services offer for 911 service and accessibility features, notes Google's decision to forego voice service on its fiber trial in Kansas City, and bemoans the difficulty of recovering costs from a base of users if the base shrinks.

These sections barely mention disincentives for broadband deployment, much less provide analysis or evidentiary support for the notion that re-classifying ILECs as non-dominant will somehow create incentives for deployment of broadband facilities. More importantly, they fail to address the tension between USTA's competitive claims regarding ILEC markets and its claim that ILECs lack broadband deployment incentives. The question USTA fails to answer is, if ILEC markets are as competitive as USTA claims, why doesn't that competition spur ILECs to deploy broadband in order to stay competitive and retain customers?

²² USTA Petition at 48.

CONCLUSION

For the reasons discussed above, the Commission should deny USTA's petition for a declaratory ruling that ILECs are non-dominant nation-wide.

Respectfully submitted,

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February 25, 2013

Certificate of Service

I, Colleen Boothby, hereby certify that true and correct copies of the preceding Comments of Ad Hoc Telecommunications Users Committee were filed this 25th day of February, 2013, via the FCC's ECFS system.



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